

Gurbachan Singh a/l Wazir Singh v Amarjit Kaur a/p Atma Singh and another appeal A

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS
A-02(A)-99-01 OF 2017 AND A-02(A)-157-01 OF 2017 B
DAVID WONG, HAMID SULTAN AND RHODZARIAH BUJANG JJCA
2 APRIL 2018

Family Law — Matrimonial property — Division of assets — Whether Divorce Court properly exercised its discretion under ss 76(1) and 76(3) of the Law Reform (Marriage and Divorce) Act 1976 in dealing with landed properties acquired by parties during their marriage — Whether maintenance sum ordered to be paid to the petitioner wife was fair and reasonable in all circumstances C
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The High Court on granting the petitioner wife's ('PW') petition for divorce from the respondent husband ('RH'), ordered RH to transfer his half-share in the matrimonial home to PW and to pay her RM5,000 per month in maintenance until either PW remarried or RH ceased to have an income. There were no children from the marriage. The High Court made no order with regard to three other landed properties that were acquired during the marriage — a medical clinic and another landed property registered in the name of RH (which, together with the matrimonial home, were acquired by the joint efforts of the parties), and a house registered in PW's name which she had bought entirely with her own resources. In the instant appeals by both parties against the High Court's order, PW sought for the maintenance award to be increased. E
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Held, dismissing both appeals:

- (1) On the facts of the case, the sum of RM5,000 for maintenance was fair and reasonable taking into consideration that the matrimonial home went to the petitioner wife and that she also had immovable properties and was still earning and/or had earning capacity (see para 14). G
- (2) Taking a holistic view of the facts and the contribution of the parties as well as their status in life and the evidence that most of the properties under dispute were purchased in their individual names, it was not a fit and proper case for the appellate court to intervene. Any reasonable tribunal appraised with the facts would say the division of the assets synchronised with the spirit and intent of ss 76(2) and 76(4) of the Law Reform (Marriage and Divorce) Act 1976 ('Act') in relation to the matrimonial home and the matrimonial assets, respectively. The approach the High Court took in respect of the landed properties fell squarely within its discretionary power envisaged in ss 76(1) and 76(3) of H
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A the Act and that power was rightly exercised. The facts of the case did not warrant any consideration under s 76(5) of the Act (see paras 10–12).

[Bahasa Malaysia summary]

B Mahkamah Tinggi membenarkan petisyen pempetisyen isteri untuk perceraian daripada suami responden, memerintahkan responden untuk memindahkan sebahagian syernya dalam rumah perkahwinan kepada pempetisyen dan untuk membiayanya pembiayaan sebanyak RM5,000 sehingga sama ada pempetisyen berkahwin semula atau responden tidak mempunyai pendapatan. Tidak terdapat anak hasil daripada perkahwinan tersebut.

C Mahkamah Tinggi tidak membuat perintah berkaitan tiga hartanah yang lain yang diperolehi semasa perkahwinan — klinik perubatan dan hartanah yang lain yang didaftarkan di atas nama responden (yang mana, bersama dengan rumah perkahwinan, diperolehi dengan usahasama

D kedua-dua pihak), dan rumah yang didaftarkan atas nama pempetisyen yang mana dia beli secara keseluruhan dengan sumber kewangannya sendiri. Dalam rayuan-rayuan ini oleh kedua-dua pihak terhadap perintah Mahkamah Tinggi, pempetisyen memohon award pembiayaan dinaikkan.

E **Diputuskan**, menolak kedua-dua rayuan:

- (1) Atas fakta kes, wang sejumlah RM5,000 bagi pembiayaan adalah adil dan munasabah dengan mengambil kira bahawa rumah perkahwinan diberikan kepada pempetisyen dan bahawa dia juga mempunyai hartanah tak alih dan masih bekerja dan/atau berupaya bekerja (lihat perenggan 14).
- (2) Mengambil pandangan holistik fakta dan sumbangan pihak-pihak dan juga status kehidupan mereka dan keterangan bahawa kebanyakan hartanah di bawah pertikaian dibeli atas nama mereka sendiri, ia adalah kes yang tidak wajar bagi campur tangan mahkamah rayuan. Apa-apa tribunal yang munasabah yang menilai fakta akan menyatakan pembahagian aset selaras dengan semangat dan niat ss 76(2) dan 76(4) Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976 ('Akta') masing-masing berkaitan kepada rumah perkahwinan dan aset perkahwinan. Pendekatan yang diambil oleh Mahkamah Tinggi berkaitan hartanah lain yang terangkum dalam kuasa budi bicaranya ditetapkan di dalam ss 76(1) dan 76(3) Akta dan bahawa kuasa telah dilaksanakan dengan betul. Fakta kes tidak mewajarkan apa-apa pertimbangan di bawah s 76(5) Akta (lihat perenggan 10–12).]

Notes

For cases on division of assets, see 7(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 4716–4724.

Cases referred to

ECM Libra Investment Bank Bhd v Foo Ai Meng & ors [2013] 3 MLJ 35, CA (refd) A

Koay Cheng Eng v Linda Herawati Santoso [2004] 6 MLJ 395, HC (refd)

Kyros International Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2013] 2 MLJ 650, CA (refd) B

Oh Leong Thye v Wong Yoke Kuen & Anor [2017] 4 MLJ 593; [2017] 1 LNS 526, CA (refd)

Sargunan Gurusamy v Jivaranee Nagarathanam [2016] 1 LNS 1487, CA (refd)

Yap Yen Piow v Hee Wee Eng [2017] 1 MLJ 17; [2017] 1 MLRA 389, CA (refd) C

Legislation referred to

Law Reform (Marriage and Divorce) Act 1976 ss 76(1), (2), (3), (4), (5), 77, 78

Appeal from: Divorce Petition No 33–377–06 of 2012 (High Court, Ipoh) D

Selva Balan (Susan Joseph with him) (Azman Joseph & Assoc) for the appellant.
Mathews Jude (Naran Singh with him) (Naran Singh & Co) for the respondent.

Hamid Sultan JCA (delivering judgment of the court): E

[1] There were two appeals fixed before us in relation to the petition for divorce filed by the wife. Appeal No A-02(A)–157–01 of 2017 is the wife's appeal and Appeal No A-02(A)–99–01 of 2017 is the husband's appeal. F

[2] The trial before the High Court involved a Syariah point on the grounds that the husband has converted to Islam (which was a hotly contested issue). However, on the date of hearing of these appeals, the learned counsel for the husband informed us that he has instruction to abandon the Syariah issue. Both the counsel then agreed that the only issue involved is in relation to the distribution of assets and maintenance order in favour of the wife in this marriage where there are no children from the wedlock. G

[3] In consequence, some of the issues related to the memorandum of appeal of the respective parties will have no relevance. H

BRIEF FACTS

[4] Both the petitioner/wife and respondent/husband were medical practitioners and their marriage was registered under the Law Reform (Marriage and Divorce) Act 1976 ('the LRMD 1976'). Before the order for divorce was granted, the petitioner had secured an interim maintenance order of RM5,000 per month from the High Court and on appeal by the respondent, I

A the Court of Appeal had affirmed the decision.

B [5] The High Court, after having granted the divorce, sustained the maintenance amount of RM5,000 per month. The petitioner in this appeal says the maintenance sum must be increased. In addition, there were also assets which the respondent had disposed of during the period of marriage which the petitioner says that the learned trial judge did not consider for the distribution of assets as well as maintenance.

C [6] The learned trial judge says that there were only five properties which had to be dealt for distribution. The final order related to distribution was only one property belonging to both the parties here. The respondent was asked to transfer his half share to the petitioner.

D [7] In essence, this case involves maintenance, division of landed properties as well as business of medical practice. The property that existed at the time of divorce as summarised by the learned counsel for the wife/petitioner are as follows:

- E (a) No 1 Lintasan Idris Dua, Taman Idris, 30100 Ipoh (the matrimonial home) in joint names;
- (b) Property at 10L, Jalan Tun Abdul Razak, Ipoh (the Clinic) registered in the name of the Respondent;
- F (c) No 5 Persiaran Asrama, Taman Canning, 34100 Ipoh Perak registered in the name of the Petitioner;
- (d) PN 161211, Lot. 321738, Mukim Hulu Kinta, Daerah Kinta registered in the name of the Respondent.

G [8] The learned counsel also says that the property (c) above was acquired and brought through the sole effort of the petitioner. For properties (a), (b) and (d) the learned counsel says that they were acquired by joint efforts of the petitioner and respondent during the marriage. And sets out the reasons as follows:

- H (a) All properties were acquired after the marriage;
- (b) The Respondent then opened a branch of his clinic known as Klinik Tasek Indera;
- I (c) The Petitioner was paid to run the said Klinik Tasek Indera;
- (d) The Petitioner worked in the said Tasek Indera Klinik from 1995 to 2010 (15 years);
- (e) All proceeds from Tasek Indera were given to the Petitioner;

- (f) The Respondent admitted during trial that Tasek Indera was formed to generate income as a team; A
- (g) It is impossible for the Respondent to acquire all the eleven (11) properties using his sole income from Klinik Kana. B

[9] The learned trial judge, in our view, prudently on the facts of the case took into consideration that there are no children of marriage as well as the properties (except the matrimonial home) had already been vested in either the name of the petitioner or the respondent and had ordered only the matrimonial home where the respondent had half the share be transferred to the petitioner. His Lordship also ordered maintenance of RM5,000 to be sustained on terms. The said judgment of the learned trial judge reads as follow: C

[45] Berdasarkan kepada alasan-alasan tersebut mahkamah telah memutuskan untuk membuat perintah seperti mana berikut:

- i. Perkahwinan di antara RS dengan PI dibatalkan dengan *dekri nisi* menjadi mutlak serta merta. D
- ii. PI berhak kepada perintah-perintah sampingan seperti mana berikut:
 - a. Nafkah — RS diperintahkan membayar PI sebanyak RM5,000 sebulan sehinggalah PI berkahwin semula atau RS tidak lagi memperoleh pendapatan. E
 - b. Harta sepencarian — RS memindah milik 1/2 bahagian Rumah Perkahwinan ke atas nama PI.
- iii. Tidak ada perintah dibuat ke atas kos. F

[10] The approach the learned judge had taken in respect of the landed properties in our view squarely falls within the discretionary power as envisaged in s 76(1) as well as s 76(3) of the LRA 1976 in respect of matrimonial home as well as matrimonial assets (see *Yap Yen Piow v Hee Wee Eng* [2017] 1 MLJ 17; [2017] 1 MLRA 389). The facts of the case also does not warrant any consideration under s 76(5) of the LRA 1976 (see *Oh Leong Thye v Wong Yoke Kuen & Anor* [2017] 4 MLJ 593; [2017] 1 LNS 526; *Sargunan Gurusamy v Jivaranee Nagarathanam* [2016] 1 LNS 1487). G

[11] As the courts' power has been rightly exercised, the appellate court as a matter of law and prudence will be slow to intervene in the discretionary exercise of the trial court related to quantum ie in relation to division of assets (see *Kyros International Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2013] 2 MLJ 650; *ECM Libra Investment Bank Bhd v Foo Ai Meng & ors* [2013] 3 MLJ 35). H I

[12] In the instant case, taking a holistic view of the facts and contribution of parties as well as their status in life and the evidence that most of the properties

A under dispute were purchased in their individual name; we do not think it is a fit and proper case to intervene save to say that any reasonable tribunal appraised with the facts will say the division of the assets synchronises with the spirit and intent of s 76(2) in relation to matrimonial home and s 76(4) in relation to matrimonial assets.

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[13] On the issue of maintenance order, there is no statutory obligation for the husband to be ordered to pay maintenance in cases where for instance when the wife is employed or has reasonable income or has sufficient assets to sustain livelihood. Section 77 only gives a discretionary power to the court to order maintenance. As a general rule, discretionary powers cannot be exercised arbitrarily. Section 77 read with s 78 do not support unjust enrichment in the wife's favour but requires the court to determine a fair sum if needed by taking into consideration the affordability of the husband as well as the quality of life the wife was exposed to during the period of marriage, etc (see *Koay Cheng Eng v Linda Herawati Santoso* [2004] 6 MLJ 395). The said ss 77 and 78 read as follows:

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77 Power for court to order maintenance of spouse

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(1) The court may order a man to pay maintenance to his wife or former wife

(a) during the course of any matrimonial proceedings;

(b) when granting or subsequent to the grant of a decree of divorce or judicial separation;

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(c) if, after a decree declaring her presumed to be dead, she is found to be alive.

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(2) The court shall have the corresponding power to order a woman to pay maintenance to her husband or former husband where he is incapacitated, wholly or partially, from earning a livelihood by reason of mental or physical injury or ill-health, and the court is satisfied that having regard to her means it is reasonable so to order.

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78 In determining the amount of any maintenance to be paid by a man to his wife or former wife or by a woman to her husband or former husband, the court shall base its assessment primarily on the means and needs of the parties, regardless of the proportion such maintenance bears to the income of the husband or wife as the case may be, but shall have regard to the degree of responsibility which the court apportions to each party for the breakdown of the marriage.

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[14] On the facts of the case, a sum of RM5,000 for maintenance in our view is fair and reasonable, taking into consideration that the matrimonial home goes to the petitioner and the petitioner also has immovable properties and still earning and/or has earning capacity.

[15] For the reasons stated above, we take the view that both the appeals have no merit. Both the appeals are dismissed with no order as to costs. Deposit is to be refunded.

We hereby order so.

Appeals dismissed.

Reported by Ashok Kumar

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